

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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IN RE PHARMACEUTICAL INDUSTRY	)	
AVERAGE WHOLESALE PRICE	)	MDL No. 1456
LITIGATION	)	
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THIS DOCUMENT RELATES TO	)	CIVIL ACTION: 01-CV-12257-PBS
ALL CLASS ACTIONS	)	Judge Patti B. Saris
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**NOTICE OF FILING OF AMENDED MASTER CONSOLIDATED  
CLASS ACTION COMPLAINT MODIFIED PER THE COURT'S  
INSTRUCTION AT THE NOVEMBER 21, 2003 HEARING**

Plaintiffs are filing today a version of the Amended Consolidated Complaint ("AMCC") which responds to the Court's instructions at the hearing. The changes to the AMCC are as follows:

1. At the hearing defense counsel argued that "on the PBM counts they don't even allege they had a contract with PBM's." Transcript ("Tr.") at p. 46. Thereafter the Court inquired as to the existence of allegations that "any one of the individual plaintiffs actually contracted based on AWP." Tr. at 51. The Court continued its inquiry as follows:

The Court: But if it's just – can you say as you stand here that each one of the plaintiffs contracted for these alleged drugs based on AWP and were injured as a result of it?

Mr. Berman: Yes.

The Court: Okay.

\* \* \*

The Court: So do that – next week is Thanksgiving. Okay.

Tr. at 52.

The Court returned to this line of inquiry at the end of the hearing:

The Court: If, in fact, you know – if, in fact, these companies did contract based on either orally or in writing – assuming it's in writing, they're big companies – based on AWP and were injured thereby, I don't know that you have to allege every transaction. In fact, you don't under the cases I've dealt with before, but just allege it because you've alleged in general they've been prejudiced in reliance on AWP. So you say you've got it, do it. Week after Thanksgiving.

Other than that, no major new theories. You're done. That is it. All right?

Mr. Berman: We have ten days. You never know what we're going to come up with.

The Court: No ten days, this is it.

Tr. at 119.

In response to the Court's comments, plaintiffs have added allegations regarding the fact that plaintiffs' drug purchases are directly based upon AWP pricing. In the case of the union health funds these contracts expressly tie payment to the published AWP. *See ¶¶ 26-36, 36(a), 541, 620 and 639(a).*

2. At the hearing, Mr. Dodds raised for the first time an argument that under Count I plaintiffs have no standing to assert claims because none of the plaintiffs were covered by Medicare Part B drugs which, according to counsel, was the focus of Count I. The Court noted that this was a new argument (Tr. 45) and that raising it "for the first time at the hearing was a little unfair." Tr. at 46. Frankly, plaintiffs' counsel were surprised by this argument because Count I is not limited to Medicare Part B. Paragraph 620 of the AMCC indicates that Count I is asserted on behalf of both classes, and those classes include anyone who bought an AWPID based on AWP, without a limitation to Part B Covered Drugs. *See ¶ 595.* Thus, Count I in its text section and by reference to the class definition (¶ 595) was not limited to Part B drugs. The heading of Count I, to which Mr. Dodds referred, created confusion because it does state "For

Unlawful Conduct Associated With Part B Covered Drugs.” However, this is a typographical error that carried over from the MCC. As the court inquired with respect to this issue, “you could have called them up … and inquired.” Tr. at 45. If defendants had done so, we could have cleared this issue up quickly. Count I is intended to and does cover non-PBM transactions for AWPID drugs of which several plaintiffs are class representatives by virtue of purchasers outside the PBM context. *See ¶¶ 27-29, 32-36.* In addition, during argument defense counsel referred to paragraph 541 of the AMCC, which alleged that payors “typically” pay based upon AWP, as a basis for an argument that there are standing issues and/or causation issues because it was not clear that payment was in fact tied to AWP. Paragraphs 26-31 make it clear that each union health fund made payments based on AWP. The language in ¶ 541 referring to “typically” has been deleted and the paragraph redrafted to eliminate any perceived ambiguity concerning payment based upon AWP and the resulting injury to plaintiffs and class members.

3. Appendix B has been amended to reflect purchases of drugs by individual plaintiffs. These purchases were listed in the text of the AMCC, but not in Appendix B. This change adds no additional drugs to Appendix A and Appendix B has been simply amended to identify purchasers of drugs that were inadvertently omitted. For example, in the body of the AMCC, plaintiff UFCW states that it purchased Johnson & Johnson’s Remicade, but in Appendix B Remicade was not checked. AMCC ¶ 29. The same is true for Sicor’s leucovorin calcium. AMCC ¶ 29. Plaintiffs submit that defendants were on notice of this omission by virtue of the listing of these drugs in the text of the AMCC as having been purchased by a plaintiff. And in the course of preparing this amendment, plaintiffs’ counsel discovered an additional scrivener’s error in changing the MCC to the AMCC. In the MCC, plaintiffs alleged that the Teamsters Health & Welfare Fund of Philadelphia purchased Bristol Meyer’s Taxol, GSK’s Navelbine, Johnson & Johnson’s Remicade and Immunex’s Novantrone. These purchases were inadvertently omitted from the AMCC and Appendix B has been modified to

reflect those purchases as well. No new drugs have been added. This reflects a correction of purchaser information only

4 For the Court's convenience a redlined copy of the modified AMCC is being delivered to Chambers and served on counsel. The paragraphs with changes are 1, 5, 26-31, 36(a), 541, the heading to Count I, and ¶ 620.

By Steve W. Berman/Signature on File

DATED: December 5, 2003.

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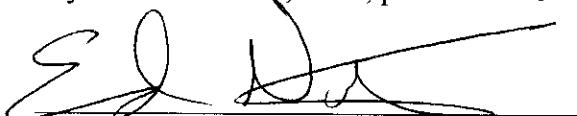
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**CERTIFICATE OF SERVICE**

I hereby certify that I, Edward Notargiacomo, an attorney, caused a true and correct copy of the foregoing Notice of Filing of Amended Master Consolidated Class Action Complaint Modified per the Court's Instruction at the November 21, 2003 hearing to be served on all counsel of record electronically on December 5, 2003, pursuant to Section D of Case Management Order No. 2.



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